

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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JOHN R. KELLY,

Petitioner,

-v.-

9:04-CV-0218  
(LEK/DRH)

WILLIAM LAPE, *Superintendent, Marcy  
Correctional Facility,*

Respondent.

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APPEARANCES:

OF COUNSEL:

JOHN R. KELLY  
Petitioner, *pro se*  
No. 02-B-0656  
Marcy Correctional Facility  
Box 3600  
Marcy, New York 13403

HON. ANDREW M. CUOMO  
Attorney General of the State  
of New York

PATRICK F. MacRAE, ESQ.  
Assistant Attorney General

**LAWRENCE E. KAHN, U.S. DISTRICT JUDGE**

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**ORDER**

Petitioner John R. Kelly ("Petitioner" or "Kelly") filed a Petition for a Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, with the Court on February 27, 2004. See Petition (Dkt. No. 1). Kelly filed an Amended Petition on November 19, 2004. See Am. Pet. (Dkt. No. 23). On January 3, 2007, a Report-Recommendation was issued by the Honorable David R. Homer, United States Magistrate Judge, which recommended that the Amended

Petition be denied. See Report-Rec. (Dkt. No. 38). This Court adopted Judge Homer's Report-Recommendation, and this action was dismissed by Order filed February 1, 2007. See Feb. 2007 Order (Dkt. No. 40). Kelly has appealed from the February 2007 Order. See Notice of App. (Dkt. No. 42). Presently before the Court is an application to proceed *in forma pauperis* on appeal. See IFP Applic. (Dkt. No. 43).

The Court notes that Kelly has **not** filed a request for a Certificate of Appealability ("COA") as required by 28 U.S.C. § 2253(c)(1). The Second Circuit has held, however, that a Notice of Appeal may be construed as a motion for a COA. See Marmolejo v. United States, 196 F.3d 377, 378 (2d Cir. 1999) (citing Hooper v. United States, 112 F.3d 83, 88 (2d Cir. 1997)). See also Forbes v. United States, No. 98 Civ. 1878(JAR), 1999 WL 1133362 (S.D.N.Y Dec. 10, 1999) (Court properly construed notice of appeal as COA, and ruled on same). This Court will, therefore, also construe Kelly's Notice of Appeal (Dkt. No. 42) as a request for a COA.

### **I. Certificate of Appealability**

Section 2253 provides, in relevant part:

**(c)(1)** Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --

- (A)** the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
- (B)** the final order in a proceeding under section 2255.

28 U.S.C. § 2253(c)(1). Furthermore, Rule 22 of the *Federal Rules of Appellate*

*Procedure* provides that an appeal may not proceed "unless a circuit justice or a circuit or

district judge issues a certificate of appealability under 28 U.S.C. § 2253(c).” See FED. R. APP. P. 22(b).

However, a COA may only be issued “if the applicant has made a substantial showing of the denial of a constitutional right.” See 28 U.S.C. § 2253(c)(2).

After reviewing the relevant portions of the file relating to this action, and for the reasons set forth in the Report-Recommendation filed January 3, 2007, and this Court’s February 2007 Order, the Court finds that Kelly has failed to make such a showing herein. Therefore, the Court **denies** Petitioner’s request.

## **II. In Forma Pauperis Application**

Turning to Kelly’s *in forma pauperis* application, because this Court previously granted his *in forma pauperis* application, see Dkt. No. 4, and has not revoked same, the instant application is **denied as moot**.<sup>1</sup>

WHEREFORE, it is hereby

**ORDERED**, that this Court will construe Kelly’s Notice of Appeal (Dkt. No. 42) also as a request for a Certificate of Appealability; and it is further

**ORDERED**, that Kelly’s Application for a Certificate of Appealability (Dkt. No. 42) is **DENIED** for the reasons set forth above; and it is further

**ORDERED**, that Kelly’s request to proceed with the appeal of this matter *in forma pauperis* (Dkt. No. 43) is **DENIED AS MOOT**; and it is further

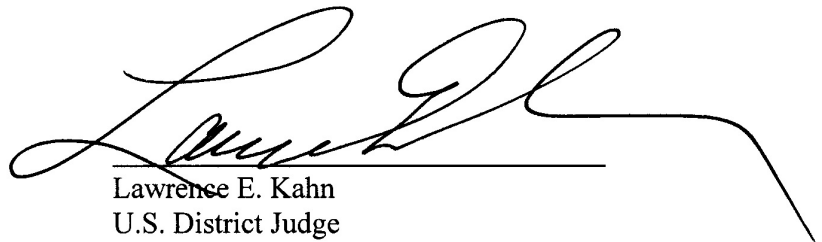
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<sup>1</sup> Neither this ruling nor the prior granting of Kelly’s application to proceed *in forma pauperis* in any way prevents the United States Court of Appeals for the Second Circuit from collecting the fees due in light of the Prison Litigation Reform Act. See Pub. L. No. 104-134, 110 Stat. 1321.

**ORDERED**, that the Clerk serve a copy of this Order upon all parties in accordance with the Local Rules.

**IT IS SO ORDERED.**

DATED: February 20, 2007  
Albany, New York



Lawrence E. Kahn  
U.S. District Judge